

<sup>3</sup> The Board notes that following the May 18, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *Id.*

## **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,668.87 because he concurrently received Social Security Administration (SSA) benefits while also receiving FECA benefits for the period March 1, 2016 through October 14, 2017; (2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$400.00 every 28 days from appellant's continuing compensation.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 26, 2006 appellant, then a 56-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he developed heel pain in his left foot due to walking while in the performance of his federal job duties. On June 14, 2007 OWCP accepted appellant's claim for left plantar fasciitis and left calcaneal stress fracture. Appellant stopped work on October 29, 2007. He underwent surgical external neurolysis of Baxter's nerve left heel and subtotal plantar fasciotomy left foot on that date. Beginning March 19, 2008 OWCP paid appellant wage-loss compensation on the periodic rolls. It directed him to report any retirement income, disability income, or compensation benefits from a federal agency.

In an informational letter dated March 2, 2012, OWCP informed appellant that FECA required his wage-loss compensation benefits to be reduced if he began receiving SSA retirement benefits based on his age and federal service. It notified him of his obligation to report receipt of such retirement benefits to avoid an overpayment of compensation.

On June 21, 2013 OWCP referred appellant for vocational rehabilitation services. By decision dated July 21, 2015, it reduced his wage-loss compensation benefits, effective that date, based on his capacity to earn wages in the constructed position of customer service representative. On August 3, 2015 appellant, through counsel, requested an oral hearing from an OWCP hearing representative. By decision dated May 3, 2016, OWCP's hearing representative affirmed the July 21, 2015 decision. Appellant appealed this decision to the Board and in its April 21, 2017 decision, the Board affirmed the May 3, 2016 decision of OWCP's hearing representative.

In completed EN1032 forms signed by appellant on March 25, 2016 and March 29, 2017, he responded "No" to the question of whether he received benefits from SSA as part of an annuity for federal service during the prior 15 months. By signing the forms, appellant certified that he understood that he "must immediately report to OWCP any improvement in his medical condition, any employment, any change in the status of claimed dependents, any third-party settlement, and any change in income from federally[-]assisted disability or benefit programs." He also certified that all the statements made in response to the questions on the form were true, complete, and correct to the best of his knowledge and belief. In the March 16, 2016 and March 21, 2017 letters accompanying the EN1032 forms, appellant was advised that the information he provided would

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<sup>4</sup> Docket No. 16-1309 (issued April 21, 2017).

be used to decide whether he was entitled to continue receiving these benefits or whether his benefits should be adjusted.

On April 11, July 26, and October 5, 2017 OWCP provided SSA with a form for calculation of dual benefits. SSA responded on May 9, July 26, and October 18, 2017 and indicated that beginning in March 2016 appellant's SSA rate, including his federal employment under FERS, was \$2,076.00 per month. The SSA rate that appellant was entitled to without his federal employment was \$1,071.50. Beginning in December 2016 these rates increased to \$2,082.20 and \$1,074.50 respectively.

In a letter dated October 20, 2017, OWCP informed appellant that he had been receiving a prohibited dual benefit resulting in an overpayment of benefits. It noted that the portion of SSA benefits earned as a federal employee was part of his retirement and that the receipt of wage-loss compensation under FECA and federal retirement simultaneously was prohibited. OWCP adjusted appellant's FECA benefits to account for his SSA offset of \$930.00, which along with his health benefits of \$481.50 reduced his FECA wage-loss compensation payments from the gross amount of \$1,359.00 to negative \$52.54. It further informed appellant that the prohibited dual benefit had resulted in an overpayment of compensation for the period March 1, 2016 through October 14, 2017.

In a notice dated November 3, 2017, OWCP advised appellant of its preliminary determination that he had received a \$19,668.87 overpayment of compensation for the period March 1, 2016 through October 14, 2017 due to the failure to offset his FECA benefits for SSA benefits he had received. It found him at fault in the creation of the overpayment because he accepted payments which he knew or should reasonably have known were incorrect. OWCP advised appellant that he could submit evidence challenging the fact, amount, or fault finding and request waiver of recovery of the overpayment. Additionally, it informed him that within 30 days, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation.

On November 14, 2017 appellant requested a waiver and a prerecoupment hearing with OWCP's Branch of Hearings and Review. Appellant disagreed that the overpayment had occurred.

A hearing regarding the \$19,668.87 overpayment was held on April 9, 2018. Appellant testified that he believed that his SSA benefits had been increased to compensate him for his decreased FECA wage-loss compensation due to the July 21, 2015 loss of wage-earning capacity determination.

On April 26, 2018 OWCP received a Form OWCP-20, signed on April 21, 2018, in which appellant listed monthly income of \$4,615.00, monthly expenses of \$3,735.51, and assets of \$11,100.00.

By decision dated May 18, 2018, an OWCP hearing representative affirmed the preliminary determination regarding the \$19,668.87 overpayment. He further found that appellant was at fault in the creation of the overpayment as he knew or reasonably should have known that he was receiving both SSA age-related benefits and OWCP wage-loss compensation benefits concurrently and therefore denied waiver of recovery of the overpayment. OWCP's hearing

representative reviewed appellant's financial documents and found that his monthly income exceeded his monthly debts by \$880.00 per month. He determined that an offset of \$400.00 every 28 days from appellant's continuing FECA compensation would allow for repayment of the overpayment of compensation without depriving appellant of the funds needed for ordinary and necessary household expenses. OWCP's hearing representative determined that there was no evidence of record that recovery would be contrary to "equity and good conscience."

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.<sup>5</sup> Section 8116 limits the right of an employee to receive compensation: While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>6</sup>

Section 10.421(d) of the implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA benefits that are attributable to federal service of the employee.<sup>7</sup> FECA Bulletin No. 97-9 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>8</sup>

Section 404.310 of SSA regulations provides that entitlement to SSA compensation begins at 62 years of age.<sup>9</sup> Section 404.409 of SSA regulations provides that for individuals born from 1943 to 1954, full retirement age is 66 years.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$19,668.87.

OWCP found that an overpayment of compensation was created in the amount of \$19,668.87 for the period March 1, 2016 through October 14, 2017. The overpayment was based on the evidence received from SSA on April 11, July 26, and October 5, 2017 regarding benefits paid to appellant. The record indicates that while appellant was receiving compensation for total disability under FECA he concurrently received SSA age-based retirement benefits. A claimant cannot receive both compensation for wage-loss and SSA retirement benefits attributable to federal

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<sup>5</sup> 5 U.S.C. § 8102(a).

<sup>6</sup> *Id.* at § 8116.

<sup>7</sup> 20 C.F.R. § 10.421(d); *see S.O.*, Docket No. 18-0254 (issued August 2, 2018); *L.J.*, 59 ECAB 264 (2007).

<sup>8</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>9</sup> 20 C.F.R. § 404.310.

<sup>10</sup> *Id.* at § 404.409.

service for the same period.<sup>11</sup> The information provided by SSA indicated that appellant received age-based SSA benefits that were attributable to federal service during the period March 1, 2016 through October 14, 2017.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received evidence from SSA with respect to the specific amount of age-based SSA retirement benefits that were attributable to federal service. The SSA provided the SSA rate with FERS, and without FERS, for specific periods commencing March 1, 2016 and continuing through October 14, 2017. OWCP provided its calculations for each relevant period based on the SSA worksheet. Appellant has not contested the amount of the \$19,668.87 overpayment and no contrary evidence has been provided to show that OWCP's calculations were incorrect. The Board has reviewed OWCP's calculation of benefits received by appellant for the period March 1, 2016 through October 14, 2017 and finds that an overpayment of compensation in the amount of \$19,668.87 was created.<sup>12</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(a) of FECA provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.<sup>13</sup> The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>14</sup> No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.<sup>15</sup>

In determining whether an individual is not "without fault" or alternatively "at fault" in the creation of an overpayment, section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or

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<sup>11</sup> See *supra* notes 7 and 8.

<sup>12</sup> See *S.O.*, *supra* note 7; *G.T.*, Docket No. 15-1314 (issued September 9, 2016).

<sup>13</sup> 5 U.S.C. § 8129(a).

<sup>14</sup> *Id.* at § 8129(b).

<sup>15</sup> See *S.O.*, and *L.J.*, *supra* note 7.

(3) Accepted a payment which he or she knew or should have known to be incorrect.”<sup>16</sup>

Section 10.433(b) of OWCP’s regulations provides:

“Whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.”<sup>17</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP properly determined that appellant was at fault in the creation of the \$19,668.87 overpayment of compensation, thereby precluding waiver of recovery of the overpayment.

OWCP applied the standard of 20 C.F.R. § 10.433(a)(3) in determining that appellant was at fault in the creation of the \$19,668.87 overpayment. In order for OWCP to establish that he was at fault in creating the overpayment of compensation, it must establish that appellant accepted a payment which he knew or should have known to be incorrect.<sup>18</sup>

In a March 19, 2008 notice, OWCP informed appellant that he was being placed on the periodic compensation rolls and it advised him that he was required to immediately inform it upon filing for or receiving SSA retirement benefits. Appellant began to receive SSA benefits as part of an annuity for federal service on March 1, 2016. He had regularly completed EN1032 forms which specifically instructed him to report any monies or income or change in monies or income from federally-assisted disability or benefit programs, and any retirement benefits or SSA benefits under FERS. The evidence of record establishes that for the EN1032 forms dated March 25, 2016 and March 29, 2017, appellant failed to report his receipt of SSA benefits as part of an annuity for federal service. These EN1032 forms provided information to appellant regarding reporting income or monies from federally-assisted programs such as SSA.

The record reflects that on EN1032 forms dated March 25, 2016 and March 29, 2017, each of which covered the 15 months prior to the date signed, appellant signed and acknowledged, “I understand that I must immediately report to OWCP any employment or employment activity, any change in the status of claimed dependents, any third-party settlement, and any monies or income or change in monies or income from federally-assisted disability or benefit programs.” Each EN1032 informed appellant of the consequences of not accurately reporting his employment activities and earnings, such as being subjected to criminal penalties and losing the right to receive workers’ compensation. In each of these forms, he reported receiving no SSA benefits as part of an annuity for federal service.

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<sup>16</sup> 20 C.F.R. § 10.433(a).

<sup>17</sup> *Id.* at 10.433(b).

<sup>18</sup> *See supra* note 15.

Consequently, the evidence of record establishes that appellant knew or should have known that he was not entitled to receive dual payments from both SSA and FECA and therefore he accepted payments which he knew or should have known to be incorrect.<sup>19</sup> The Board therefore finds that OWCP met its burden of proof to establish that appellant was at fault in the creation of the \$19,668.87 overpayment, thereby precluding waiver of recovery of the overpayment.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.441(a) of OWCP's regulations provides in pertinent part:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."<sup>20</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment of compensation by deducting \$400.00 every 28 days from appellant's continuing compensation payments.

In determining that appellant could repay the overpayment through \$400.00 deductions from continuing compensation payments, OWCP took into consideration the financial information submitted by appellant as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. It discussed appellant's financial circumstances and noted that appellant's income exceeded his expenses by \$880.00 per month. Therefore, OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant's compensation payments every 28 days.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received a \$19,668.87 overpayment of compensation because he concurrently received SSA and FECA benefits for the period March 1 through October 14, 2017. The Board further finds that OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment. The Board further finds that OWCP properly required recovery of the overpayment by deducting \$400.00 from appellant's continuing compensation payments every 28 days.

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<sup>19</sup> See *C.N.*, Docket No. 16-0134 (issued March 8, 2016) (finding that a claimant who failed to report SSA benefits on multiple EN1032 forms was at fault in the creation of an overpayment received during a period covered by the forms).

<sup>20</sup> 20 C.F.R. § 10.441(a); see *S.O.*, *supra* note 7; *Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 18, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 24, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board